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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 286

FRANK B. POTTER, AS UNITED STATES ATTORNEY, ET AL., PETITIONERS

v.

FRED ESTES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of petitioners, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit reversing an order adjudging respondent in contempt of the District Court for the Northern District of Texas (1 R. 92, 2 R. 79-80).[1]

OPINION BELOW

The opinion of the Court of Appeals (1 R. 87-92, 2 R. 75-79) has not yet been reported.

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[1] The record is in two volumes which were filed in the court below at different times and are not paginated consecutively. The volume which commences with the motion dated November 3, 1949, is designated "1" and the other is designated "2."

JURISDICTION

The judgment of the Court of Appeals was entered on August 5, 1950 (1 R. 92, 2 R. 79). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a witness subpoenaed to testify before an immigration inspector in an investigation to determine the right of certain aliens to remain in the United States is privileged, by virtue of the Fifth Amendment's guarantee against compulsory self-incrimination, to refuse to disclose information bearing on whether the aliens were members of, or affiliated with, the Communist Party.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the Constitution provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

Section 2385 of Title 18, United States Code (1948) provides:

> Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assas-

sination of any officer of any such government; or

Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or

Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

STATEMENT

Acting pursuant to the provisions of 8 U.S.C. 152,[2] an immigration inspector was conducting an

[2] This statute provides in pertinent part:

"* * * Any district director of immigration and naturalization designated by the Commissioner or any inspector in charge shall also have power to require by subpoena the attendance and testimony of witnesses before said inspectors and the production of books, papers, and documents touching the right of any alien to enter, reenter, reside in, or pass through the United States, and to that end may invoke the

investigation into the right of seven aliens to reside in the United States. On October 12, 1949, in the course of the investigation, the inspector issued subpoenas to respondent directing him to produce various documents and give testimony bearing on the right of the aliens to remain in this country (1 R. 1-2). Respondent appeared, but refused to testify (1 R. 3). By appropriate motion, an order was obtained from the United States District Court for the Northern District of Texas directing respondent to comply with the subpoenas (1 R. 4-5). Again he refused to be sworn (1 R. 20-21, 33). After a hearing on an order to show cause why respondent should not be held in contempt, the court again directed respondent to comply with the subpoenas (1 R. 40-66, 67, 73-74, 76-78). Respondent appeared before the immigration inspector on December 5, 1949, and after being sworn and stating his name, he refused to answer any additional questions on the ground that to do so might incriminate him of a crime (2 R. 9-10). The questions, which were separately stated as to each of the seven aliens under investigation, inquired (see 2 R. 10-24)—

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aid of any court of the United States; and any district court within the jurisdiction of which investigations are being conducted by an immigrant inspector may, in the event of neglect or refusal to respond to a subpoena issued by any such district director or inspector in charge or refusal to testify before said immigrant inspector, issue an order requiring such person to appear before said immigrant inspector, produce books, papers, and documents if demanded, and testify; and any failure to obey such order of the court may be punished by the court as a contempt thereof. * * *"

(a) Whether respondent was acquainted with the alien;

(b) Whether the alien is or ever was a member or affiliate of the Communist Party;

(c) Whether the alien ever donated funds to the Communist Party or gave "any of his time and energies" to the Party;

(d) Whether the alien ever solicited members for the Party or subscriptions to its literature or distributed the Party's literature; and

(e) Whether the alien ever attended any meetings of the Communist Party.

After a hearing, respondent was found in contempt of court and was fined $100 and sentenced to imprisonment for thirty days unless he sooner purged himself (2 R. 35-36).

The order of the court was stayed pending appeal (2 R. 67). On the appeal, the Court of Appeals for the Fifth Circuit (Holmes and Borah, JJ.) reversed the order of the district court on the ground that respondent reasonably could fear that the answers which he refused to make might be used against him in a prosecution under the Smith Act, *supra,* and, therefore, he was justified in invoking the privilege against self-incrimination.

REASONS FOR GRANTING THE WRIT

Two other Courts of Appeals recently have passed on the basic issue involved in the present case, which is one of obvious importance. The de-

cision below is in conformity with the view taken by the Ninth Circuit in *Kasinowitz* v. *United States,* 181 F. 2d 632, and is in conflict with the view of the Tenth Circuit in *Patricia Blau* v. *United States,* 180 F. 2d 103. This Court granted certiorari in the latter case on May 15, 1950, and it is on the calendar for argument as No. 22, October Term, 1950. We have filed a petition for a writ of certiorari in the *Kasinowitz* case (No. 136, October Term, 1950) on the basis of the conflict of decisions.

The present petition is designed to preserve the Government's rights pending resolution of this conflict. In the circumstances, we respectfully suggest that the Court may desire to withhold final action on this petition until the conflict is resolved.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

SEPTEMBER 1950.

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